

ALOR JANGGUS SOON SENG TRADING SDN. BHD. & 6 ORS.

a

v.

SEY HOE SDN. BHD. & 2 ORS.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HJ. MOHD. JEMURI SERJAN CJ (BORNEO)
TAN SRI EDGAR JOSEPH JR. SCJ
TAN SRI DATUK MOHD EUSOFF CHIN SCJ
[CIVIL APPEAL NO. 02-569- 1993]
28 JANUARY 1995

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COMPANY LAW: Action by minority shareholders against company and majority shareholders - Duty of trial Judge - Whether trial Judge bound to consider whether minority shareholders were entitled to a derivative action - Rule in *Foss v Harbottle* - Whether action came within exception to the rule.

c

INJUNCTION: Ex-parte interlocutory injunctions - Dissolution - Trial Court did not consider question of serious issue to be tried when setting aside injunction but deliberated on issue of locus standi - Whether fatal - Whether injunctive orders to be restored - Guidelines in *American Cyanamid* case - Whether to be followed.

d

PRACTICE & PROCEDURE: Proceeding to set aside interlocutory injunction - Respondents raising preliminary objection on locus standi of applicants - Whether proper - Whether correct procedure was to resort to O.18 r. 19 or O. 33 r. 2 of RHC 1980.

This was an appeal against the decision of the High Court setting aside an *ex-parte* interlocutory injunction which it had earlier granted to the appellants. The appellants and the second respondent were two of the shareholders of the first respondent (the company), holding 43% and 25% respectively of the shares therein. The company in turn was a shareholder of another company (MGR), holding 682,500 shares therein (the MGR shares). The second respondent was also the managing director of the company as well its representative in MGR.

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In August 1992, the shareholders of the company, including the appellants, agreed to sell the MGR shares to the third respondent, a shareholder of MGR, following a proposal to that effect by the second respondent. On 1 September 1992, the second respondent on behalf of the company executed an agreement with the third respondent and by that, sold the MGR shares to the latter.

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Three months after the sale of the MGR shares, MGR became a public-listed company and its shares thus appreciated in value. The appellants, who lost all monetary benefits accruing from the public-listing of MGR on account of the untimely sale of the MGR shares, filed a writ action against the respondents challenging the validity of the agreement and further, alleging fraud on the part of the second respondent. The appellants alleged that the sale of the MGR shares herein was fraudulently orchestrated by the second respondent, as the latter had known in advance that MGR was about to be listed on the KLSE but had kept the information away from the company or the appellants. The appellants also applied *ex-parte* for an interlocutory injunction to restrain the company and the second respondent from effecting any transfer of the MGR shares to the third respondent.

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The learned Judge granted the appellants' application for interlocutory injunction, but subsequently dissolved it on the grounds, inter alia, that the Court had no jurisdiction to meddle in the internal management of a company acting within its powers, and that in order to re-

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- a* dress a wrong done to the company or to recover damages alleged to be done to the company, that action ought to be brought by the company itself, that the appellants thus had no locus standi to bring the actions against the respondents, that the action was misconceived as damages was an adequate remedy, that the balance of convenience tipped against the appellants as the purchase price of the shares had been fully paid and that there was an inexcusable delay to apply for the injunction. In so ruling the learned Judge however failed to
- b* consider as a matter of principle whether the appellants had raised a serious issue to be tried.

- Before the Supreme Court, the primary issue that arose was whether the failure by the learned Judge to consider the question of serious issue to be tried, coupled with his decision to deliberate on the question of *locus standi* when the proceeding before him was to hear an application to set aside an interlocutory injunction, had vitiated his whole decision, such
- c* that the dissolved interlocutory injunction ought to be restored.

Held:

- d* [1] A grant or refusal of an interlocutory injunction should not have the effect of disposing of the action finally in favour of whichever party was successful upon the application. It is thus inexplicable that the Judge below allowed the application of the respondents to hear their preliminary objection on the issue of the appellants' *locus standi*, when the proceeding was to hear their application to set aside the *ex-parte* interlocutory injunction. Not only that the procedure adopted by the respondents unorthodox and constituted a blatant departure from the correct procedure, but determination of that issue would eventually give a stamp of finality to the case. Clearly if the respondents succeeded on the *locus standi* issue, that would spell the end of the case which means that the main action of the appellants would have to be withdrawn consequently. If the respondents were so sure that the
- e* appellants had no locus standi or cause of action, the correct procedure is for them to invoke O. 18 r. 19 or O. 33 r. 2 RHC 1980 because if they succeed in their applications on any of these orders, the civil suit and the injunction itself would both collapse.

- f* [2] In such a case as the present, the Court is enjoined to first determine at a preliminary hearing the crucial issue of whether the appellants were entitled to bring what is known as a derivative action or a minority shareholders' action on behalf of themselves. Inevitably this also enjoins the Court to consider the question of whether the appellants' action herein fell within the proper boundaries of the exception to the rule in *Foss v Harbottle* 2 Hare 461. In the instant case, however, there was no argument on this issue and nor was there any direction by the learned Judge to have this crucial issue argued or witnesses examined to determine the issue. Instead, what happened was, there was a hearing of the respondents'
- g* preliminary objection on the issue of the appellants' locus standi, which in effect, amounted to a hearing of a point of law on a different issue altogether.

- h* [3] In not dealing with the question of whether the appellants' case came within the exception to the rule in *Foss v Harbottle*, the learned Judge's decision on the issue of *locus standi*, therefore, is not definitive and conclusive as there was no adequate and comprehensive argument on that issue. But be that as it may, on the facts of this case it could not be said that the appellants do not have *locus standi*. This ground alone is sufficient to dispose of this appeal in favour of the appellants.

- i* [4] The essence of an application for interlocutory injunction is that it should be made with promptitude and the Court will not grant the injunction if the plaintiff is guilty of unreasonable delay. It is important however to note that what is important is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction

claimed. Also in considering the lapse of time, delay should only commence from the discovery of the circumstances giving title to relief. In the instant case, it was only on 17 March 1993 that the appellants realised that something was very amiss about the whole affairs of the transfer of the MGR shares to the third respondent. It was a result of this that a writ was filed on 1 April 1993, and an application for an ex-parte injunction filed the next day, hardly two weeks after the discovery of the alleged fraud. The appellants therefore cannot be said to be guilty of unreasonable delay as they clearly had acted with due promptitude.

[5] At an interlocutory proceeding for an injunction the Court must be satisfied that there is a serious issue to be tried, which issue, before anything else, must first be established by the applicant. In the premises, it is beyond comprehension why the learned judge herein did not consider as a matter of principle and priority the question whether there was in this case a serious issue to be tried but had leap-frogged to consider the question of adequacy of damages and balance of convenience.

[6] To determine the question of whether the appellants herein had raised a serious issue to be tried, what needs to be considered is whether the statements as contained in their respective affidavits have raised a *prima facie* plausibility as to merit further investigation on their truth. An examination of the issues raised by the appellants showed that the issues raised were *prima facie* serious issues to be tried. The issue of the breach of clause 3 of the agreement, for instance, is a highly contentious issue. Then there was the allegation that the agreement is ultra vires the resolution of the extraordinary general meeting held on 23 August 1993, which, on the available evidence, is not a hollow allegation. On the materials available, therefore, there is no reason to say that the issues raised are not plausible.

[7] The majority of the damages claimed by the appellants clearly do not admit of easy quantification and it would not be right at this stage of the proceedings to speculate as to what the exact quantum would be. Besides, the value of the shares also fluctuates from time to time. There is thus a doubt as to the adequacy of the remedies. The learned Judge's ruling on this issue, therefore, is not without flaw.

[8] The factor that weighed heavily on the mind of the learned Judge in deciding on the balance of convenience in favour of the respondents was the completion of the agreement and the subsequent transfer of the MGR shares to the third respondent. A scrutiny of the exhibits showed that what happened was just the opposite. There was no evidence that the third respondent had paid the completion sum mentioned in the agreement and there was also no evidence showing a genuine transfer of the shares to the third respondent. At all material times the shares were still registered in the name of the company. In this respect, truly, what the Court is faced with is, at one end of the spectrum of possibilities, if the appellants fail at the trial, all that the respondents would suffer because of the injunction is the loss of profits and costs of the litigation which can be quantified and the respondents could adequately be compensated with. At the other end, if the injunction is refused and the appellants should succeed, the appellants will suffer unquantified monetary loss, harm and inconvenience which could not be adequately compensated. In that case more injustice would be done to the appellants. Also, since on the evidence there is no vestige of the transfer of the shares to the third respondent, or to any other persons, the *status quo* should be preserved, which should be the state of affairs existing during the period immediately preceding the issue of the writ claiming permanent injunction. The balance of convenience thus clearly lies with the appellants. In the circumstances the interlocutory injunctive orders herein should be restored.

[Appeal allowed]

a Per Curiam

It is already too late now for the respondents to invoke O. 18 r. 19 because they must have filed their unconditional appearance thereby depriving themselves of the right to invoke that Order. However it is still open to them to have recourse to O. 33 of the RHC if they are so minded.

b [Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG SYARIKAT: Tindakan oleh pemegang saham minoriti terhadap syarikat dan pemegang saham majoriti - Kewajipan Hakim perbicaraan - Sama ada Hakim perbicaraan terikat untuk mempertimbangkan bahawa pemegang saham minoriti adalah berhak kepada tindakan terbitan - Kaedah dalam Foss lwn. Harbottle - Sama ada tindakan terlingkung dalam pengecualian kepada kaedah.

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INJUNKSI: Injunksi interlokutori *ex-parte* - Pembubaran - Mahkamah perbicaraan tidak mempertimbangkan persoalan isu serius yang kena dibicarakan ketika mengenyepikan injunksi tetapi menimbangkan isu locus standi - Sama ada memudaratkan - Sama ada perintah-perintah injunktif harus dikekalkan semula - Garis panduan dalam American Cyanamid case - Sama ada harus dituruti.

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AMALAN & PROSEDUR: Prosiding untuk mengenyepikan injunksi interlokutori - Responden membangkitkan bantahan awal atas locus standi pemohon - Sama ada wajar - Sama ada prosedur yang betul adalah untuk berpaling kepada A. 18 k. 19 atau A. 33 k. 2 Kaedah-Kaedah Mahkamah Tinggi, 1980.

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Ini adalah satu rayuan terhadap keputusan Mahkamah Tinggi nengenepikan injunksi interlokutori *ex-parte* yang mana ianya telah pada awalnya diberikan kepada perayu. Perayu dan responden kedua merupakan dua daripada pemegang saham responden pertama (syarikat tersebut), masing-masing memegang 43% dan 25% dari saham-saham di situ. Syarikat tersebut sebaliknya adalah pemegang saham sebuah syarikat yang lain (MGR), memegang 682,500 saham di dalamnya (saham-saham MGR). Defendan kedua juga merupakan pengarah urusan syarikat tersebut dan juga wakilnya dalam MGR.

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Dalam bulan Ogos, 1992, pemegang-pemegang saham syarikat tersebut, termasuk perayu, telah bersetuju untuk menjual saham-saham MGR kepada responden ketiga, seorang pemegang saham MGR, berikutan satu cadangan mengenainya oleh responden kedua. Pada 1 September 1992, responden kedua bagi pihak syarikat tersebut telah meyempurnakan satu perjanjian dengan responden ketiga dan melaluinya, telah menjual saham-saham MGR tersebut kepada responden ketiga.

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Tiga bulan selepas penjualan saham-saham MGR, MGR telah menjadi sebuah syarikat tersenarai dan saham-sahamnya dengan itu meningkat pada nilainya. Perayu yang kehilangan semua faedah kewangan yang terakru daripada penyenaraian MGR akibat penjualan saham-saham MGR yang tidak kena pada masanya itu, telah memfailkan satu writ tindakan terhadap responden-responden mencabar keesahan perjanjian tersebut dan selanjutnya, mendakwa perbuatan fraud oleh responden kedua. Perayu mengatakan bahawa penjualan saham-saham MGR di sini telah dirancang secara fraudnya oleh responden kedua, kerana responden kedua telah mengetahui awal-awal lagi bahawa MGR akan disenaraikan pada KLSE (Bursa Saham Kuala Lumpur) tetapi tidak memberikan maklumat tersebut kepada syarikat tersebut atau perayu. Perayu telah juga memohon *ex-parte* untuk mendapatkan injunksi interlokutori bagi menegah syarikat tersebut dan responden kedua daripada menguatkuasakan sebarang pemindahan saham-saham MGR kepada responden ketiga.

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Tuan Hakim yang bijaksana telah membenarkan permohonan perayu untuk injunksi interlokutori, tetapi selepas itu telah membubarkannya atas alasan bahawa, antara lainnya, Mahkamah tidak mempunyai bidangkuasa untuk mencampuri pengurusan dalaman sesebuah syarikat bertindak mengikut kuasa-kuasanya, dan bahawa untuk memperbaiki kesalahan yang telah dilakukan kepada syarikat atau untuk mendapatkan semula ganti rugi yang dikatakan telah dilakukan kepada syarikat tersebut, tindakan seharusnya dilakukan oleh syarikat tersebut sendiri, bahawa perayu dengan itu tidak mempunyai *locus standi* untuk memulakan tindakan terhadap responden-responden, bahawa tindakan telah disalah-zahirkan kerana ganti rugi adalah remedi yang mencukupi, bahawa imbalan penyelesaian tidak menyebelahi perayu oleh kerana harga belian telah dibayar sepenuhnya dan bahawa terdapatnya kelewatan untuk memohon injunksi tersebut. Dalam memutuskan sedemikian, Tuan Hakim yang bijaksana walaubagaimanapun, gagal mempertimbangkan pada dasarnya sama ada perayu-perayu telah menimbulkan isu yang serius untuk dibicarakan.

Di hadapan Mahkamah Agung, isu utama yang timbul adalah samada kegagalan oleh Tuan Hakim yang bijaksana untuk menimbangkan persoalan isu serius untuk dibicarakan, bersama-sama dengan keputusannya menimbangkan persoalan *locus standi* apabila prosiding di hadapannya adalah untuk mendengar satu permohonan untuk mengenepikan satu injunksi interlokutori, telah merosakkan keseluruhan keputusannya, sehinggakan injunksi interlokutori tersebut patut dikekalkan semula.

Diputuskan:

[1] Satu pemberian atau penolakan injunksi interlokutori seharusnya tidak mempunyai kesan akhir melupakan tindakan untuk manfaat pihak yang berjaya ke atas permohonan tersebut. Dengan itu sukar difahami mengapa Tuan Hakim di bawah telah membenarkan permohonan responden untuk mendengar bantahan awal atas isu *locus standi* perayu, sedangkan prosiding tersebut adalah untuk mendengar permohonan mereka bagi mengenepikan injunksi interlokutori *ex-parte*. Bukan sahaja prosedur yang diterima-pakai oleh responden luarbiasa dan terang-terang menyimpang daripada prosedur yang betul, tetapi penentuan isu itu kesudahannya menjadikan kes tersebut muktamad. Jelasnya jika responden berjaya atas isu *locus standi*, ianya akan membawa kepada penamatan kes tersebut yang bermakna bahawa tindakan utama perayu akan ditarik-balik. Jika responden pasti bahawa perayu tidak mempunyai *locus standi* atau kausa tindakan, prosedur yang betul bagi mereka adalah merujuk A. 18 k. 19 atau A. 33 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 kerana jika mereka berjaya dalam permohonan-permohonan mereka atas mana-mana dari perintah-perintah ini, guaman sivil dan injunksi itu sendiri akan gagal kedua-duanya.

[2] Dalam kes sepertimana kes semasa ini, Mahkamah adalah dikehendaki, diperingkat perbicaraan awal menentukan isu penting samada perayu berhak untuk memulakan apa yang dikenali sebagai tindakan terbitan atau tindakan pemegang-pemegang saham minoriti bagi pihak diri mereka sendiri. Ini bermakna Mahkamah juga dikehendaki mempertimbangkan persoalan sama ada tindakan perayu di sini jatuh dalam lingkungan wajar pengecualian kepada kaedah *Foss lwn. Harbottle* 2 Hare 461. Dalam kes semasa walaubagaimanapun, tidak terdapat apa-apa penghujahan atas isu ini dan tidak juga terdapat apa-apa arahan oleh Hakim yang bijaksana untuk menghujahkan isu yang penting ini atau saksi-saksi diperiksa untuk menentukan isu tersebut. Sebaliknya, apa yang berlaku adalah, terdapatnya perbicaraan bantahan awal responden atas isu *locus standi* perayu, yang merupakan perbicaraan undang-undang atas satu isu yang berlainan sama sekali.

[3] Oleh kerana tidak mengendahkan persoalan sama ada kes perayu terlingkung dalam kecualian kepada kaedah dalam *Foss lwn. Harbottle*, keputusan Hakim yang bijaksana atas

a isu *locus standi*, adalah tidak tepat dan muktamad kerana tidak terdapat penghujahan yang lengkap dan mencukupi mengenai isu itu. Walau apa pun, atas fakta-fakta kes ini ianya tidak dapat diperkatakan bahawa perayu tidak mempunyai *locus standi*. Alasan ini sahaja adalah mencukupi untuk melupuskan rayuan dipihak perayu.

b [4] Intipati sesuatu permohonan untuk injunksi interlokutori adalah bahawa ianya harus dibuat dengan cepat dan Mahkamah tidak akan memberikan injunksi jika plaintif bersalah atas kelewatan yang tidak wajar. Adalah penting bagaimanapun untuk mengambil perhatian bahawa apa yang penting bukannya tempoh masa kelewatan tersebut tetapi sama ada kelewatan itu telah dengan sebab-sebab tertentu menjadikannya tidak adil untuk memberi injunksi yang dituntut. Juga dalam mempertimbangkan peluputan masa, kelewatan seharusnya bermula daripada penemuan keadaan-keadaan yang memberikan hak kepada relief. Dalam kes di sini, hanya pada 17 Mac 1993 perayu mendapati ada sesuatu yang tidak kena berhubung dengan keseluruhan hal-ehwal pemindahan saham-saham MGR kepada responden ketiga. Akibatnya satu writ telah difailkan pada 1 April 1993 dan satu permohonan untuk injunksi *ex-parte* difailkan pada keesokan harinya, iaitu dua minggu selepas penemuan fraud yang dikatakan itu. Perayu dengan itu tidak boleh dikatakan bersalah atas kelewatan yang tidak wajar kerana mereka telah bertindak dengan segera.

d [5] Pada satu prosiding interlokutori untuk injunksi Mahkamah mestilah berpuashati bahawa terdapat isu yang serius untuk dibicarakan, yang mana isu tersebut, sebelum apa-apa hal yang lain, haruslah dibuktikan oleh pemohon. Dalam keadaan yang sedemikian, ianya di luar kefahaman mengapa Hakim yang bijaksana tidak mempertimbangkan sebagai perkara prinsip dan keutamaan, persoalan samada terdapat dalam kes ini isu serius untuk dibicarakan tetapi telah sebaliknya melangkah untuk mempertimbangkan persoalan kecukupan ganti rugi dan imbalan keselesaan.

e [6] Bagi menentukan persoalan sama ada perayu-perayu di sini telah menimbulkan isu yang serius untuk dibicarakan, apa yang perlu ditimbang adalah samada pernyataan-pernyataan sepertimana yang terkandung dalam affidavit mereka masing-masing telah menimbulkan *prima facie* satu kemunasabahan untuk membolehkan pemeriksaan lanjut atas kebenarannya. *f* Memeriksa isu yang ditimbulkan oleh perayu menunjukkan bahawa isu-isu yang ditimbulkan adalah *prima facie* isu-isu yang serius untuk dibicarakan. Isu kemungkiran fasal 3 perjanjian tersebut, contohnya, adalah isu yang amat bertikaian. Kemudiannya terdapat pengatahan bahawa perjanjian tersebut adalah *ultra vires* ketetapan mesyuarat agung luarbiasa yang diadakan pada 23 Ogos 1993, yang mana berdasarkan keterangan yang ada, bukanlah pengatahan yang tidak berasas. Atas bahan-bahan yang ada, tidak terdapat sebab bagi menyatakan bahawa isu-isu yang ditimbulkan adalah tidak munasabah.

g [7] Majoriti ganti rugi yang dituntut oleh perayu jelas tidak melibatkan perhitungan mudah dan ianya tidak betul pada peringkat ini dalam prosiding tersebut, untuk mengagak apakah kuantam yang tepat. Tambahan pula, nilai saham-saham tersebut juga berubah-ubah dari masa ke masa. Dengan itu terdapat keraguan mengenai kecukupan remedi. Keputusan Hakim yang bijaksana atas isu ini, dengan itu, tidak terlepas dari kecacatan.

h [8] Faktor berat yang terdapat dalam pemikiran Hakim yang bijaksana dalam memutuskan imbalan keselesaan memihak kepada responden adalah penyempurnaan perjanjian tersebut dan pemindahan saham-saham MGR kepada responden ketiga. Penelitian ekshibit-ekshibit menunjukkan bahawa apa yang berlaku adalah sebaliknya. Tidak terdapat keterangan bahawa responden ketiga telah membayar jumlah penyempurnaan yang tersebut dalam perjanjian itu *i* dan tidak terdapat juga keterangan yang menunjukkan pemindahan tulin bagi saham-saham tersebut kepada responden ketiga. Pada setiap waktu yang material, saham-saham tersebut

masih berdaftar atas nama syarikat tersebut. Berhubung dengan perkara ini, sesungguhnya apa yang dihadapi oleh Mahkamah adalah pada satu hujung kemungkinan, jika perayu gagal di perbicaraan tersebut, yang akan dialami oleh responden akibat injunksi tersebut adalah kehilangan keuntungan dan kos litigasi yang boleh diperhitungkan dan responden boleh diberikan pampasan secukupnya. Sebaliknya pula, jika injunksi tersebut ditolak dan perayu berjaya, perayu akan mengalami kerugian wang yang tidak dapat diperhitungkan, kecederaan dan ketidakselesaian yang tidak boleh diberikan pampasan yang secukupnya. Dalam keadaan yang sedemikian, ketidakadilan yang lebih akan dihadapi oleh perayu. Juga, oleh kerana pada keterangan tersebut tidak terdapat apa-apa yang menunjukkan pemindahan saham-saham tersebut kepada responden ketiga atau kepada mana-mana orang lain, *status quo* haruslah dikekalkan, iaitu hal keadaan yang wujud sejurus sebelum timbul isu writ menuntut injunksi tetap. Imbangan keselesaan dengan itu jelas berpihak pada perayu. Dalam keadaan yang sedemikian, perintah-perintah injunksi interlokutori di sini seharusnya dikekalkan semula.

[Rayuan dibenarkan]

Per Curiam:

Adalah terlambat sekarang bagi responden untuk menggunakan A. 18 k. 19 KMT 1980 oleh kerana mereka semestinya telah pun memfailkan kehadiran tanpa syarat yang menghalang mereka menggunakan Aturan tersebut. Bagaimanapun masih belum terlewat untuk mereka menggunakan A. 33 k. 2 jika mereka mahu.

Cases referred to:

- Burland & Ors.v. Earle & Ors.* [1901] AC 83 (PC) (foll)
Prudential Assurance Co. Ltd. v. Newman Industries Ltd & Ors. (No. 2) [1982] 1 ChD 204 (CA) (foll)
Hew Sook Ying v. Hiw Tin Hee [1992] 2 MLJ 189 (SC)(foll)
Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor. [1986] 2 MLJ 198 (SC) (foll)
R. v. Senate of University of Aston [1969] 2 All ER 964 (foll)
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 (refd)
Chung Khiaw Bank Ltd. vs. Bajaj Textiles Ltd. & Anor. [1968] 1 MLJ 299 (foll)
N.W.L. Ltd v. Woods [1979] 1 WLR 1294 [HL (E)] (refd)
Hubbard v. Vosper [1972] 2 QB 84 (refd)
Porter v. The National Union of Journalists [1980] IRLR 404 (refd)
Smith v. Croft (No.2) [1988] 1 Ch114 (refd)
Fross Harbottle 2 HAre 461 (refd)
Edwards & Anor. v. Halliwell & Ors. [1950] 2 All ER 1067 (refd)
Eastmanco (Kilner House) Ltd. v. Great London Council (Vac. Ct.) [1982] 1 WLR 2
Daniels v. Daniels [1978] Ch 406 (cit)
Heron International Ltd. & Ors. v. Lord Grade, Associated Communications Corp Plc & Ors. [1983] BCLC 244 (cit)
Automobiles Peugeot SA v. Asia Automobile Industries Sdn. Bhd. & Ors. [1988] 3 MLJ 209 (dist)
Salisbury v. The Metropolitan Railway Company [1870] 39 LJR Equity Ch 429 (refd)
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 (refd)
Legg v. I.L.E.A. [1972] 1 WLR 1245 (refd)
Carter v. Trevelyan 11 CL & F 714 (refd)
Erlanger v. New Sombrero Phosphate Co. [1877-78] 3 AC 1218 (cit)
Cayne & Anor. v. Global Natural Resources Plc [1984] 1 All ER 225 (refd)
Lord Cable,(decd) (ChD) [1977] 1 WLR 7 (refd)
Patel & Others v. W.H. Smith (Eziot) Ltd. & Another [1987] 1 WLR 853 (refd)
C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc. [1988] AC 1013 (refd)
Mothercare Ltd. v. Robson Books Ltd. [1979] F.S.R. 466 (refd)

- a* *Evans Marshall & Co. Ltd. v. Bertola S.A. & Anor. (CA) [1973] 1 WLR 380 (refd)*
Sheffield Nickel and Silver Plating Co. Ltd. v. Unwin [1877] 2 OB 214 (refd)

Legislation referred to:

Companies Act 1965, ss. 131(c), 132(c), 42, 181(2),
 Rules of the High Court, 1980, O. 18 r. 19, O. 33 r. 2
 Rules of the Supreme Court 1957, O. 33 r. 3

- b* National Land Code, s. 278(1)

Other sources referred to:

Chitty on Contract, 25th Edn.

Specific Relief, by Anand & Iyer, 9th Edn., Vol. I

For the appellants - Low Hop Bing (F.L. Siak with him); M/s. Low Hop Bing & Assoc.

For the first respondent - Manjit Singh; M/s. Manjit Singh & Co.

- c* *For the second respondent - Ghazi Ishak (Ong Kheng Leong with him); M/s. Ghazi & Lim*
For the third respondent - Surinder Singh; M/s. Ong Manecksha

JUDGMENT

Hj. Mohd Jemuri Serjan CJ (Borneo):

- d* This is an interlocutory appeal by a group of minority shareholders following the dissolution of an *ex parte* interlocutory injunction granted on 2 April 1993 by the High Court, Penang by the same Judge who granted the *ex parte* interlocutory judgment. On the application by the defendants to set it aside *ex facie* this case would belong to the normal run of interlocutory injunction cases but for the unorthodox procedure adopted by the defendants and approved by the learned Judge in obtaining the dissolution of the interlocutory injunction. The
- e* affidavits filed by both parties in the interlocutory proceedings raise the spectre of difficult points of law and facts. It is to be noted that at this stage of the proceedings the defendants have not as yet filed their defence. It is also to be noted that only Sey Hoe Sdn. Bhd., the first defendant, and not its directors, other than Lim Cheng Teek @ Lim Chin Teik who is also the managing director of the company, are cited as defendants. It is necessary to recount the facts of the case as they appear from the statement of claim and the affidavits of the plaintiffs.
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Facts of the Case

- The plaintiffs (the appellants in this appeal) are the shareholders holding about 43.75% in Sey Hoe Sdn. Bhd., the first defendant, (hereinafter referred to as "the company"). Lim Cheng Teek, the second defendant, is the managing director of the company, holding approximately
- g* 25.6% shares in the company. At a board of directors' meeting of the company held on 5 March 1992, it was resolved that Lim Cheng Teek be authorised to act as representative of the company at all meetings of the MGR Timber Marketing Sdn. Bhd. which later on was known as MGR Corporation Sdn. Bhd. (MGR) in which the company originally had 682,500 shares. On 29 July 1992 the board of directors of the company held another meeting which was attended by all the directors of the company, namely, Lim Tee Yong, Lim Tee Keng, Lim Chin Hean, and Lim Cheng Teek, and it was resolved that the secretary of the company do
- h* convene an extraordinary general meeting of the company for the purpose of considering the proposal to dispose of the company's shares in (1) MGR Corporation Sdn. Bhd., (2) Maxall (Sabah) Sdn. Bhd., (3) Perusahaan Kilang Papan Buildstrength Sdn. Bhd., (4) Siegerim K-9 Co. Sdn. Bhd. and (5) Dapu Raya Sdn. Bhd. to Ng Kay Kim and Choong Keong Kor (the
- i* third defendant). Consequently, on 23 August 1992 the extraordinary general meeting of the company was held and attended by all the shareholders, namely, Lim Cheng Teek, as a proxy

to his own company, Lim Chin Teik Holdings Sdn. Bhd., Lim Tee Keng as a proxy to Lim Tee Sin, Lim Tee Leong as a proxy to Lim Tee Tai, Lim Tee Keng, Lim Tee Leong, Lim Tee Chong, Lim Tee Yong, Lim Tee Khim and Lim Chin Hean as proxy to his own private company, Lim Chin Hean Holdings Sdn. Bhd. at which meeting the important resolution was arrived at that the company should dispose of its shares in the several companies referred to above. According to the minutes of the extraordinary general meeting the disposal of those shares was subject, *inter alia*, to the following terms:

- (1) That the purchaser shall pay the sum of RM25,000 being forfeitable deposit upon signing of the relevant agreement; and
- (2) That the purchaser shall pay the relevant redemption sum to redeem the company's land held under Grant No. 4905, Lot 104, Section 16, Town of Alor Setar, District of Kota Star, Kedah, and to secure the discharge of charge from the Hongkong & Shanghai Banking Corporation in Sabah within six calendar months from the date of the agreement; and
- (3) That Lim Cheng Teek is authorised to execute the above relevant agreement.

Accordingly, pursuant to the resolution of the extraordinary general meeting Lim Cheng Teek had the sale and purchase agreement, (the agreement), prepared by a firm of solicitors, Messrs Hoe & Ahmad Zaki, and on 1 September 1992 the agreement was signed by Choong Keong Kor as the purchaser and Lim Cheng Teek on behalf of the company. As it turned out Ng Kay Kim dropped out of the transaction.

The civil suit no. 22-109-1993 (MT1) arose out of the sale of the MGR shares, purportedly pursuant to the agreement which was alleged to be invalid. There are also allegations of the breach of the terms of the agreement on the part of Choong Keong Kor, particularly in respect of the payment of the balance of the purchase price which was to be effected by the discharge of the charge of the company's land by Choong Keong Kor and an unauthorised variation of the terms of the agreement by Lim Cheng Teek in order to enable Choong Keong Kor to settle the payment of the balance of the purchase price beyond the time stipulated in the agreement.

For the purpose of convenience the relevant terms of the agreement are reproduced.

- 1) The vendor shall sell the said shares together with all its interest whatsoever in Maxall (Sabah) Sendirian Berhad and Dapu Raya Sendirian Berhad to the purchaser and the purchaser shall purchase the same from the vendor at the purchase price of Ringgit: One Million Nine Hundred & Fifty (RM1,950,000) only (hereinafter referred to as the purchase price).
- 2) The purchaser shall pay the sum of Ringgit: Twenty Five Thousand (RM25,000) upon signing hereof by way of deposit and to account of the purchase price.
- 3) The purchaser shall pay the balance of the purchase price to Hongkong & Shanghai Banking Corporation in Sabah to redeem the said land and to secure the discharge of charge from the said bank within six (6) calendar months from the date hereof (hereinafter referred to as the completion date).
- 4) The purchaser shall be responsible for all interest and other charges that Hongkong & Shanghai Banking Corporation shall impose from 1 September 1992 until the payment of the balance of the purchase price to Hongkong & Shanghai Banking Corporation to redeem the said land.
- 5) The vendor shall deposit the original share certificate for the said shares with M/s Hoe & Ahmad Zaki, Advocates & Solicitors of No. 1564, (Tkt. 2) Wisma Southern Bank,

a Jalan Kota, 05000 Alor Setar, Kedah (hereinafter referred to as the said solicitors) together with the duly executed memorandum of transfer as stakeholder.

...

6) Upon full payment of the balance of the purchase price and all interest and other charges as stipulated in clause 5 above, the said solicitors shall effect the transfer of the said shares to the purchaser or his nominee free of any encumbrances whatsoever.

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9) In the event the purchaser fails to pay the balance of the purchase price within the completion date or perform and comply with the terms and conditions herein contained, this agreement shall thenceforth be terminated and the deposit paid under clause 2 hereinabove shall be forfeited to the vendor and thereafter neither party shall have any claims whatsoever against the other.

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Cause of Action

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The plaintiffs by their statement of claim instituted the civil suit no. 22-109-93 (MT1) on the basis of a cause of action in contract and tort, and this is amplified by the affidavit of Lim Tee Keng, the second plaintiff affirmed on 3 June 1993. Principles of company law inevitably are also interwoven into those of contract and tort. By paragraph 14 of the statement of claim the plaintiffs averred that the agreement is null and void and a device to defraud all the shareholders of the company. The particulars of the fraud are condescended to as follows. As a representative of the company in MGR Lim Cheng Teek had attended several meetings of MGR and, therefore, was in possession of inside first-hand information that MGR would be public-listed in KLSE Second Board in consequence of which MGR shares would most probably fetch higher price in the open market. On 19 September 1992 "The Star" carried a news item on its Business Section that MGR was seeking a listing on the KLSE Second Board and in that event would be offering 2.9 million shares at RM2.30 each. However, it was averred that Lim Cheng Teek never at any time disclosed to the shareholders of the company that MGR would be public-listed in KLSE Second Board and the probable profits that would accrue therefrom.

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Being a representative of the company in MGR, Lim Cheng Teek on his own initiative proposed at the board of directors' meeting of the company held on 29 July 1992 to dispose of the company's shares in MGR to Ng Kay Kim and Choong Keong Kor, both shareholders in MGR. It was also averred that Choong Keong Kor is related to Lim Cheng Teek. As a managing director of the company Lim Cheng Teek owed the company a fiduciary duty and was bound to advise the shareholders of the company on the proposed public-listing of MGR and the advantage derived therefrom. Even after MGR was placed on the KLSE Second Board as a public-listed company on or about 20 August 1992 Lim Cheng Teek failed in his fiduciary duty to inform the shareholders of the company about it. Lim Cheng Teek purportedly signed the agreement, knowing fully well that in doing so he had acted in breach of the resolution of the company's extraordinary general meeting of 23 August 1992 which authorised the sale of MGR shares to both Ng Kay Kim and Choong Keong Kor and not to Choong Keong Kor alone. The resolution had not been amended or varied at any time by another resolution of the extraordinary general meeting to enable him to do so.

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Under Clause 5 of the agreement Lim Cheng Teek on behalf of the company was required to deposit the original MGR share certificates with Messrs. Hoe & Ahmad Zaki, Advocates & Solicitors of No. 1564, (Tkt.2) Wisma Southern Bank, Jalan Kota, 0500 Alor Setar, Kedah together with the executed memorandum of transfer as stakeholder. Acting in breach of this

clause, Lim Cheng Teek took away the share certificate in order to perpetrate the fraud on the company and the plaintiffs. It was alleged that armed with the share certificate Lim Cheng Teek was able, in conspiracy with Choong Keong Kor, to obtain all the rights issue and bonuses on the MGR shares, thereby increasing the original 682,500 shares to 1,365,000 shares. All this was done without the knowledge of the shareholders. The new MGR shares of the company were divided into three categories:

- (a) 292,500 shares to be offered to the public;
- (b) 648,000 shares are placed under a moratorium and to be disposed of at stipulated times; and
- (c) 424,500 shares are transferred to UWB Nominees Sdn. Bhd.

The sale of the shares to the public and to UWB Nominees again was carried out without the knowledge and consent of the shareholders. Similarly, the proceeds of the sale of the two categories of shares not covered by the moratorium had never been accounted for to the company or to the shareholders by Lim Cheng Teek.

Under Clause 3 of the agreement the purchaser, Choong Keong Kor, was given six months as from 1 September 1992 to discharge the charge and thereby settle the balance of the purchase price, the relevant completion date being 28 February 1993 but as on 26 February 1993 the charge had not been discharged. A search conducted at the Alor Setar Land Office on 31 March 1993 disclosed that the position had not changed. Therefore, going by clause 9 of the agreement any failure on the part of Choong Keong Kor to pay the balance on the relevant date would result in the automatic termination of the agreement and the forfeiture of his deposit. As far as the plaintiffs were concerned they alleged there was no resolution to enlarge the time of the completion date. Under the circumstances, the motive of Lim Cheng Teek became evident, namely, to defraud the plaintiffs by abusing his position in MGR to his own advantage and that of those directors who supported him in the company. All this was achieved by Lim Cheng Teek in conspiracy with Choong Keong Kor.

In his affidavit dated 3 June 1993 Lim Tee Keng repeated the allegations contained in the statement of claim, highlighting the fact that Lim Cheng Teek took full advantage of his position in MGR by clever manipulation to omit his own personal shares from being placed under the moratorium as was the case with the company's shares so that his shares could be disposed of without delay and thereby fetch higher prices for them. Such manipulation was proof of Lim Cheng Teek's fraudulent and ulterior motive to benefit himself at the expense of the company and the shareholders. He also alleged that the sale of the MGR shares to Choong Keong Kor was conveniently made to further their conspiracy to defraud the plaintiffs, Choong Keong Kor, being a shareholder of the MGR and in possession of the vital inside-information in advance regarding the public-listing of MGR. Choong Keng Kor was but a nominal purchaser to provide a legitimate cover for what otherwise would be an illegal transaction. The agreement, therefore, was void as being tainted by fraud which had occasioned the loss of about RM 7 million.

In his affidavit dated 7 May 1993 Lim Cheng Teek dismissed the allegations against him and Choong Keong Kor as vexatious, scandalous and baseless and denied that he had abused his position in MGR as representative of the company to his own advantage. On the other hand, he averred that the sale of the MGR shares and others to Choong Keong Kor was approved by the annual general meeting which was also attended by the plaintiffs who never raised any objection in connection therewith. As a matter of fact, he also had informed the plaintiffs of the imminent public-listing of MGR but the plaintiffs took no notice of it. Be-

a sides, he also wrote to Lim Tee Tai, the 5th plaintiff, who was then in Australia about the possibility of MGR being public-listed. He also refuted the allegation that Choong Keong Kor was in any way related to him.

b On the withdrawal of Ng Kay Kim from his bid to purchase the MGR shares Lim Cheng Teek explained that although at the board of directors' meeting on 29 July 1992 the offer was to be made to both Ng Kay Kim and Choong Keong Kor but at the extraordinary general meeting held on 23 August 1992 only Choong Keong Kor showed interest in buying the shares. He averred that the plaintiffs had waived the requirement of clause 5 as he needed the share certificate to be produced to MGR which was then in the process of changing its name from MGR Timber Marketing Sdn. Bhd. to MGR Corporation Sdn. Bhd. There was no breach of clause 3 as the balance of the purchase price had been paid, he having relied on the Hongkong & Shanghai Bank's letter of 26 February 1993 to the effect that the bank would expedite the discharge and release of the security as requested by the company. **c** Lim Cheng Teek also raised the question of *locus standi* of the plaintiffs in bringing the civil suit, contending that it was not for the plaintiffs to bring the action because if there was any loss it was a loss suffered by the company and in any case he only held 25.6% of the shares in the company. It is obvious here that Lim Cheng Teek expressed his doubt that the plaintiffs were in fact minority shareholders as they alleged. Assuming, if there was any remedy available to the plaintiffs then it was he who should be sued in his capacity as the managing director of the company instead of the company and Choong Keong Kor. **d**

e In a further affidavit dated 15 June 1993 Lim Cheng Teek insistently denied any conspiracy between him and Choong Keong Kor and the other directors of the company to defraud the company and the plaintiffs since Lim Tee Keng himself was also a director. On the proliferation of the original 682,500 MGR shares Lim Cheng Teek disputed the averment that the 1,365,000 shares belonged to the company on the ground that the original shares were already sold to Choong Keong Kor which sale was already completed while the company only held the shares as trustee for Choong Keong Kor pending the registration of the transfer of the shares to him. Therefore, he argued the 1,365,000 shares clearly and legally belonged to Choong Keong Kor and not the company.

f Two other directors of the company, Lim Chin Hean and Lim Tee Yong in support of the defendants' application to set aside the interlocutory injunction in their affidavit dated 13 June 1993 confirmed that Lim Cheng Teek only held 25.6% shares in the company through his own company, Lim Chin Teik Holdings Sdn. Bhd. Generally, this affidavit merely echoed the contents of Lim Cheng Teek's affidavits.

g Choong Keong Kor also filed an affidavit affirmed on 11 June 1993 wherein he claimed that he was a *bona fide* purchaser for valuable consideration and had fully performed his part of the bargain in the agreement. He denied that there was any breach of the terms of the agreement. Neither was he related in any way to Lim Cheng Teek. He disclaimed any knowledge of the fraud allegedly perpetrated by Lim Cheng Teek alone or in conspiracy with him to defraud the company or the shareholders.

h *The High Court Judgment*

i The learned Judge in the Court below allowed the application by the defendants to set aside the *ex parte* interlocutory injunction dated 2 April 1993 which he himself issued earlier. The salient points in his judgment may be summarized as follows. It is settled law that the Court will not interfere with the internal management of a company, acting within its powers and has no jurisdiction to do so, and in order to redress a wrong done to the company or

to recover monies or damages alleged to be done to the company that action should be brought by the company itself. His Lordship relied on the authority of *Burland & Ors. v. Earle Ors.* [1901] AC 83 (PC) and obviously *Prudential Assurance Co. Ltd. v. Newman Industries Ltd & Ors.* (No. 2) [1982] 1 ChD 204 (CA). On the facts, as he found them from the affidavit evidence his Lordship was satisfied that plaintiffs had no *locus standi* to bring the action against the defendants. Even assuming that the plaintiffs were the minority shareholders, based on the authority of *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 (SC), his Lordship found no evidence that the plaintiffs had attempted to resolve their grievances at the board of directors' meeting or the annual general meeting of the company. Furthermore, there was no evidence that the first and second defendants refused to allow the action to be taken by the company itself. Having regard to these principles, he found (a) that the action of the plaintiffs was misconceived; (b) while admitting that the plaintiffs had established a cause of action, nevertheless the action was misconceived for the same reasons as he explained above; and (c) as the remedy sought by the plaintiffs was damages for the loss of profits, damages was an adequate remedy. The loss suffered by the plaintiffs was financial loss in that after the sale of the company's shares in MGR to Choong Keong Kor and after the public-listing of the MGR shares the value of the shares appreciated considerably. Therefore, if there was such a loss damages could be ascertained. (d) On the question of balance of convenience the balance was in favour of the defendants since the purchase price of the shares had been fully paid and the charge on the land was already released by Choong Keong Kor. The learned Judge also held that the interest of Choong Keong Kor should be protected as he was a *bona fide* purchaser. (e) The last ground was the delay on the part of the plaintiffs to bring the action which therefore prejudiced the rights of Choong Keong Kor in the MGR shares. He found that there was a delay of approximately six months between the time of the extraordinary general meeting of the company whereby the sale of the MGR shares to Choong Keong Kor was approved and the date of the *ex parte* application and about four months since the completion of the sale and the discharge of the charge. In both cases the delay was not explained. On the authorities of *Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor.* [1986] 2 MLJ 198 (SC), *R. v. Senate of University of Aston* [1969] 2 All ER 964 and *Chung Khiaw Bank Ltd. vs. Bajaj Textiles Ltd. & Anor.* [1968] 1 MLJ 299 his Lordship found there was an unexplained delay which was fatal to the interlocutory injunction. The learned Judge after recounting the brief facts of the case also mentioned in his judgment that on the date of the hearing of the application to set aside the *ex parte* interlocutory injunction Counsel for the defendants raised preliminary objection. He had heard the preliminary objection but decided to make no decision on the objection and to postpone it until he had heard the merits of the application. According to his Lordship he took this step to avoid repeated appeals and delay in the proceedings.

American Cyanamid's Case

When the question of the grant or refusal of an interlocutory injunction falls to be considered by the Court, the leading case of *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 immediately comes to mind which has been consistently and faithfully followed in our Courts. The *American Cyanamid's* case provides an authoritative and most helpful approach to cases where the function of the Court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the main issues between the parties can only be resolved by a trial. However, Lord Diplock himself who gave the definitive opinions in that case admitted later in his judgment in *N.W.L. Ltd v. Woods* [1979] 1 WLR 1294 [HL(E)] that there are limitations in the guidelines. At page 1306 Lord Diplock observed:

- a* ...*American Cyanamid Corpn. v. Ethicon Ltd.*, which enjoins the Judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial...
- b* Two prerequisites must be present before Lord Diplock's guidelines can come into play. Firstly, the plaintiffs' case must raise serious issues to be tried. If the plaintiffs fail at that point there clearly is no case for an injunction. Secondly, the trial of the main suit is likely to take place in the sense that the plaintiffs' case shows that they are genuinely concerned to pursue the claim to trial and they are seeking the injunction as a means of holding operation pending the trial. Once it can be established that there are serious issues to be tried then the other guidelines must be invoked. The Court has to consider:
- c*
- (a) Whether damages are adequate remedy;
 - (b) Where does the "balance of convenience" lie;
 - (c) Are there any "special factors".
- d* However, as is stated in *Hubbard v. Vosper* [1972] 2 QB 84 and approved by Lord Diplock in *American Cyanamid's* case at page 407D the discretion of the Court to grant or refuse interlocutory injunction should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy.
- e* In England the Courts are enjoined to invoke *American Cyanamid's* guidelines, whenever appropriate. This was emphasised in *Porter v. The National Union of Journalists* [1980] IRLR 404 where Lord Diplock observed at page 406(7) thus:
- f* My Lords, at no stage in these proceedings has this been a case where grant or refusal of an interlocutory injunction, would have the effect of disposing of the action finally in favour of whichever party was successful upon the application, as was the case in *N.W.L. Ltd. v. Woods* [1979] IRLR 478. The strike itself was over before the proceedings were begun. The only question was whether the plaintiffs could lawfully be expelled, or otherwise penalised, for having refused to take part in it; and it was unlikely, as subsequent events have shown, that either side would throw in their hands at the interlocutory stage of the action. So it was a case that fell within the normal rule laid down by the House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. Slade J. however, although he did refer to *American Cyanamid*, did not in his judgment consider the balance of convenience at all. **His failure to do so, in my view, vitiated any purported exercise of his discretion.** (Emphasis added).
- g*
- h* In the Court below the question of serious issues to be tried was never canvassed by Counsel for the defendants and surprisingly the learned Judge never touched at all on this issue in his judgment even when Encik John Khoo had addressed the Court on this point which must first be established. The omission of this issue in the judgment is conspicuous. It is evident from the notes of proceedings that Encik Manjit Singh for the company and Encik Ghazi for Lim Cheng Teek raised the *locus standi* of the plaintiffs to bring the action as their preliminary objection, it apparently being the nub of their objection. The learned Judge inexplicably allowed the application to hear the preliminary objection in a proceeding to hear an application by the defendants to set aside the *ex parte* interlocutory injunction. We would elaborate presently on this aspect of his Lordship's judgment. In the course of the arguments
- i* both Counsel cited the cases of *Burland v. Earle* (*supra*) and *Prudential Assurance Co. Ltd. v. Newman Industries Ltd & Ors.*(*supra*). Encik Ghazi also submitted that the plaintiffs had no cause of action because if there was any loss the loss would be suffered by the

company and not the shareholders. It would seem, perhaps, from the point of view of the defendants if they could succeed on the *locus standi* issue that would be the end of the case. The main action itself would have to be withdrawn consequently.

As we have said in the introductory part of our judgment, the procedure adopted by the defendants was unorthodox, a blatant departure from the correct procedure which Templeman L.J. pointed out in the *Prudential Assurance* case and adopted by Knox J. in *Smith v. Croft (No.2)* [1988] 1 Ch. 114. We, therefore, are of the view that we should make our observations on this aspect of the appeal as it appears that it has never been called for consideration in our Court before.

Procedure

The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court, 1980 because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities. The defendants relied heavily on the *Prudential Assurance* case to support their contention on the plaintiffs' lack of *locus standi*, and therefore directed the main thrust of their arguments in that direction. Unfortunately, Encik John Khoo for the plaintiffs never at any time raised objection to this unusual departure from the normal accepted procedure for reasons best known to himself as it seems obvious to us there are relevant questions to be raised in his favour.

First of all the *Prudential Assurance* case does not deal with injunction but, *inter alia*, the rights of the minority shareholders to bring the action either derivative action on behalf of Newman or on their own personal rights and is not an authority on the issue of whether interlocutory injunction should be set aside. Secondly, Templeman L.J. in the course of delivering his judgment criticized Vinelott J. in dismissing the summons issued by Mr. Bartlett and Mr. Laughton, the other defendants in that case when they invoked *Foss v. Harbottle* 2 Hare 461, not on the ground that the plaintiffs were entitled to bring a derivative action but on the ground that it was more convenient to decide that issue after the action had been tried. Templeman L.J. was clearly of the view that Vinelott J. had erred when he failed to determine the crucial issue whether there was allegation of fraud by the minority shareholders suing as such they were entitled to the relevant claim and their action fell within the proper boundaries of the exception to the rule in *Foss v. Harbottle*. This is evident from his observations at page 221 (A-B):

In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v. Harbottle*. We desire, however, to say two things. First, as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivation action....

Further down the page Templeman L.J. continued:

... In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle* ...

The relevant exception to the rule in *Foss v. Harbottle* in so far as this case is concerned is the first exception referred to by Jenkins, L.J. in his judgment in the case of *Edwards*

- a** & *Anor. v. Halliwell & Ors.* [1950] 2 All ER 1064 at page 1067. This is how he expressed the first exception:

- b** The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the Court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an
- c** inflexible rule and it will be relaxed where necessary in the interests of justice.

- d** Lord Templeman's observations clearly enjoin the Courts in such cases as the present that this crucial issue must first be determined at a preliminary hearing so that if the plaintiffs fail then *cadit quaestio*. What happened before Vinelott's J's Court happened also in the instant case though, admittedly, there was a hearing on a point of law on different issue altogether and there was no argument and no direction by the learned Judge to have this crucial issue argued and witnesses examined before him in order to determine that issue.

- e** As a further illustration on the proper procedure to be adopted on this same question it would be illuminating to look at the other English cases where the same issue was discussed at length. The procedure enjoined by Lord Templeman was adopted by Knox J. in the case of *Smith v. Croft (supra)*. The facts of the case briefly are as follows. The plaintiffs, who held a minority of shares in F. Ltd. brought an action against F. Ltd, three executive directors and the chairman, a non-executive director, and four companies closely associated with one or other of the three executive directors, claiming that the directors had paid themselves excessive remuneration, that the payments in 1982 to the associated companies were contrary to s. 42 of the Companies Act 1981 and that certain payments of expenses to directors were excessive. The plaintiffs between them held 11.86% of the issued shares in F. Ltd; the
- f** defendants between them held 62.54% of the remaining shares 2.54% were held by a company which actively supported the plaintiffs, while 3.22% were held by persons or companies which, it was common ground, were to be treated as supporting the defendants, W.Ltd., a company not under the control of either the plaintiffs or the defendants, held 19.66% of the shares in F. Ltd. and was opposed to the continuance of the plaintiffs' action.

- g** On a motion by the chairman and F. Ltd to strike out the plaintiffs' action under R.S.C. O. 18 r. 19 or under the inherent jurisdiction as vexatious, frivolous or an abuse of process it was held that:

- h** (1) That the defendants' application raised the issue whether the plaintiffs could proceed with their minority shareholders' action and, although that raised difficult questions of law, the defendants, by invoking the procedure under RSC., O. 18 r. 9 rather than the procedure for determining a preliminary issue of law under RSC, O. 33, r. 3, had not adopted such an inherently defective procedure that the Court should not proceed to determine the issues raised; and that since the effect of the Court deciding those issues against the plaintiffs would be determinative of the action, the Court would entertain the application and consider whether *prima facie* the company was entitled to the relief claimed in the action and whether the action was within the exception to the rule in *Foss v. Harbottle*.
- i**

- (2) That although excessive remuneration paid to directors might be an abuse of power,

where the power to decide remuneration was vested in the board, it could not be *ultra vires* the company; and that in view of the uncontradicted evidence about the specialised field in which the company operated and the high levels of remuneration obtaining there it was more likely that the plaintiffs would fail than succeed on the issue of quantum; that likewise no *prima facie* case had been shown that the executive directors' expenses were excessive; and that, *prima facie*, the payments to associated companies were not *ultra vires* since payments at the request of an executive director to an outside entity were capable of being payments in respect of services rendered by the executive director, save that there was a *prima facie* case of irregularity regarding certain payments not fully cured by subsequent adoption of the accounts at the annual general meetings at which those payments should have been disclosed; that since the admitted payments of £33,000 to associated companies had not been shown to be reasonably necessary for the purpose of providing for amounts likely to be incurred by way of directors' remuneration there was a *prima facie* case of infringement of s. 42 of the Companies Act 1981.

(3) That although a minority shareholder had *locus standi* to bring an action on behalf of a company to recover property or money transferred or paid away in an *ultra vires* transaction, he did not have an indefeasible right to prosecute such an action on the company's behalf; that it was proper to have regard to the views of the independent shareholders, and their votes should be disregarded only if the Court was satisfied that they would be cast in favour of the defendant directors in order to support them rather than for the benefit of the company, or if there was a substantial risk of that happening; that there was no evidence to suggest that the votes of W. Ltd. would be cast otherwise than for reasons genuinely thought to be for the company's advantage; and that, accordingly, since the majority of the independent shareholders' votes, including those of W. Ltd., would be cast against allowing the action to proceed, the statement of claim should be struck out.

Knox, J. reviewed and dealt extensively with all the authorities including *Prudential Assurance* case on the application of O. 18 r. 19 and O. 33 r. 3 of the RSC. It is pertinent to reproduce the relevant passage of his judgment on the procedure. His observation on this passage appears on page 135 as follows:

I am satisfied that the statements which I have read in the Court of Appeal as to the procedure to be adopted in these matters, although plainly *obiter* as was in fact conceded, should be regarded by me as a guide to be followed as faithfully as possible. In my judgment, as a matter of procedural law, either O. 18, r. 19 or O. 33, r. 3 is a potentially possible vehicle for such an application as is involved in the present case to decide whether a plaintiff minority shareholder has the necessary *locus standi*. But for present purposes it is sufficient for my decision to hold, as I do, that the procedure under O. 18, r. 19 is not of itself an impossible procedure which leads to an application, made under that rule or under the inherent jurisdiction, to be struck out as being evidently improper. It seems to me that although the Court of Appeal undoubtedly had O. 33 procedure before it in the form of the summons in relation to which they were discussing the propriety of what had happened below, their guidance was intended to be general in relation to minority shareholders' actions, and on that basis I find that **the procedure is not inherently defective.** (emphasis added)

In an earlier case Sir Robert Megarry, V. C. also had occasion to deal with the same issue in the case of *Eastmanco (Kilner House) Ltd. v. Great London Council (Vac. Ct.)* [1982] 1 WLR 2. The relevant passage in his judgment on this issue appears on page 14 as follows:

...This is, of course, only a motion, and there has been no *viva voce* evidence or cross-examination on affidavits. It is clear from the decision of the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No.2)* [1982] 2 W.L.R. 31 that it is right that a *Foss v. Harbottle* point **should where possible be decided as a preliminary issue and not left for determination at the trial.** On such an application the Court has to do the

- a* best it can on the evidence and other material which the parties have chosen to put before it, even though further evidence and other material may well be put forward later, and perhaps lead to other conclusions... (emphasis added)

- b* Under the circumstances, after considering the authorities above starting from *Prudential Assurance* case we are satisfied in our own minds that the learned Judge had erred in the same way as Vinelott J in that case in not dealing with the question whether the plaintiffs' case comes within the exception to the rule in *Foss v. Harbottle*'s case. His Lordship's decision on the *locus standi*, therefore, is not definitive and conclusive as there was no adequate and comprehensive arguments on that issue to enable him to do so.

- c* It was open to the defendants to resort to O 18 r. 19 or O. 33 r. 2 of our High Court Rules 1980 but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone this appeal should succeed. It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded.

- d* Encik Ghazi also brought up an important point in that the plaintiffs being merely shareholders representing about 43% the matter in dispute should be resolved with the company first. This argument found favour with the learned Judge citing the case of *Hew Sook Ying v. Hiw Tin Hee* (*supra*). On this point we would again refer to the passage in Knox J's judgment in the case of *Smith v. Croft (No.2)*(*supra*) appearing at page 184 (C-F):

- e* As to that Mr. Potts submitted that no reported authority held that in a case falling within the fraud on a minority exception to the rule in *Foss v. Harbottle* the Court should go beyond seeing whether the wrongdoers are in control and count heads to see what the other shareholders, i.e. those other than the plaintiffs and the wrongdoers, think should be done. I accept that in many reported cases the Court has not gone on to the second stage. *Mason v. Harris* [1879] 11 ChD 97 is one such case, and there are modern examples too, such as *Pavrides v. Jensen* [1956] Ch 565 and *Daniels v. Daniels* [1978] Ch 406. But the fact that such an investigation was not conducted is not conclusive that it could not be conducted, more especially in the absence of any argument on this precise point. An investigation for interlocutory purposes of the propriety of the exercise of voting power in connection with the proposed prosecution of a minority shareholder's action was conducted by Sir Robert Megarry V. C. in *Eastmanco (Kilner House) Ltd. v. Greater London Council* [1982] 1 WLR 2. In that case he permitted the action to proceed, but Mr. Aldous submitted that the careful scrutiny to which the propriety of the shareholders' voting activities was subjected is of itself an indication of the significance that the Court in a proper case will attach to it. This I accept.

- g* From this passage it would appear that this investigation should be carried out during the hearing of the preliminary issue whether the plaintiffs' case comes within the exception to the rule in *Foss v. Harbottle*. That is all we need to say on this point in our answer to *Hew Sook Ying*'s case.

Locus Standi

- h* In the course of hearing this appeal we permitted Encik Ghazi to make his submission on the *locus standi* when he brought the issue before us because it is the main issue that was discussed at considerable length by the learned Judge. Notwithstanding what we have said about the procedure that should be adopted in dealing with the *locus standi* point we feel constrained to deal with this point. Before us Encik Ghazi adopted his own arguments on this point in the Court below and in reply Encik Low Hop Bing also supported Encik John Khoo's arguments in the Court below. In order to dispose of this point we have to make
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reference to the plaintiffs' cause of action, particularly the one based on tort, i.e. fraud. There is the allegation of fraud on the part of Lim Cheng Teek in conspiracy with Choong Keong Kor when the sale of the original 682,500 shares in MGR was transacted. The other cause of action is based on contract in that it is alleged by the plaintiffs that the agreement is void and of no effect thereby nullifying any transfer of the shares to Choong Keong Kor pursuant thereto. Damages are prayed for in consequence of the fraud and the breach of the agreement.

Encik Ghazi disputed Lim Tee Keng's averment that the plaintiffs are the minority shareholders since Lim Cheng Teek had only 25.6% of the company's shares and cited as the second defendant besides the company itself. The other two directors of the company, namely, Lim Chin Hean and Lim Tee Yong were not sued. The learned Judge agreed with this contention although he conceded that if the shares of the two directors were taken into account then the defendants would be the majority shareholders. This is a technical point on procedure. The fact that the company was cited as a defendant and the further fact that these three directors, namely, Lim Cheng Teek, Lim Chin Hean and Lim Tee Yong are said to be in control of the company the submissions of Encik Ghazi lost all its sting. In any event, it is still not too late for the plaintiffs to amend the writ and statement of claim by adding the other two directors in order to clearly show that they are minority shareholders. We need only to refer to some authorities where the minority shareholders are entitled to bring an action against its own directors and the company in its own personal capacity. Notably, among these authorities are the cases of:

- (1) *Daniels v. Daniels* (*supra*).
- (2) *Estmanco Ltd. v. G.L.C. (Vac. Ct.)*(*supra*).
- (3) *Burland v. Earle* (*supra*)
- (4) *Heron International Ltd. & Ors. v. Lord Grade, Associated Communications Corp plc & Ors.* [1983] BCLC 244.

The relevant part of Templeman J's judgment in *Daniel's* case is at pages 413-414 as follows:

The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company and that breach of duty not only harms the company but benefits the directors. In that case it seems to me that different considerations apply. If minority shareholders can sue if there is fraud, **I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves.** [emphasis added] it would seem to me quite monstrous-particularly as fraud is so hard to plead and difficult to prove - if the confines of the exception to *Foss v. Harbottle* 2 Hare 461, were drawn so narrowly that directors could make a profit out of their negligence....

In *Eastmanco's* case Sir Robert Megarry J's observations on this important issue are at page 12 (C-F)

It was on the firmly established exception of 'fraud on a minority' that Mr. Steinfeld mainly relied. It does not seem to have yet become very clear exactly what the word 'fraud' means in this context; but I think it is plainly wider than fraud at common law, in the sense of *Derry v. Peek* [1889] 14 App Cas 337. In a valuable survey of the authorities, Templeman J recently came to the conclusion that this head permitted the minority to sue even though

a there had not been even an allegation of fraud; *Daniels v. Daniels* [1978] 1 Ch 406. This was a case in which a husband and wife were the two directors of a company and also the majority shareholders. They caused the company to sell to the wife land owned by the company; and four years later she sold the land for over 28 times what she had paid for it. The Judge refused to strike out the statement of claim of minority shareholders in *Foss v. Harbottle* proceedings against the two directors and the company. The principle which he derived from the cases was that;

b ...a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company:’ see p.414.’

c Apart from the benefit to themselves at the company’s expense, the essence of the matter seems to be an abuse or misuse of power. ‘Fraud’ in the phrase ‘fraud on a minority’ seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power.

He continued at pages 14H and 15A in the following words:

d It accordingly seems to me that even if Mr. Brodie were right in his main submissions of law (and I do not think that he is), as the evidence stands he has not got the necessary facts to support them. This is, of course, only a motion, and there has been no *viva voce* evidence or cross-examination on affidavits. It is clear from the decision of the Court of Appeal in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2)* [1982] 2 WLR 31 that it is right that a *Foss v. Harbottle* point should where possible be decided as a preliminary issue and not left for determination at the trial. On such an application the Court has to do the best it can on the evidence and other material which the parties have chosen to put before it, even though further evidence and other material may well be put forward later, and perhaps lead to other conclusions. I may add that if Mr. Brodie were right, and the test was whether the majority genuinely believed that their action was in the best interests of the company, **the genuineness of the belief would often be difficult to decide as a preliminary issue without virtually a full trial of the point..** (emphasis supplied)

The relevant passage of the judgment of Lord Davey in *Burland's* case appears at page 93 and reads as follows:

f ...But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. **The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.** A familiar example is, where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* [1874] LR 9 Ch 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall v. Gardiner* [1875] 1 ChD 13, at p. 25. (Our own emphasis.)

i Lawton, LJ at pages 261-262 in *Heron's* case observes on this issue:

...First, ACC will suffer a loss to the extent that its shares in Central are depreciated in value. That is a loss exclusively to the coffers of ACC. It is not a loss to the pockets of the shareholders in ACC, although it might, in theory, cause the market value of ACC shares to fall. No shareholder in ACC could sue the directors for a diminution in the value of his shares on that account for the reason given by this Court in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No.2)* [1982] 1 All ER 354 at 366:

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But what he (a shareholder) cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares ... because such a 'loss' is merely a reflection of the loss suffered by the company.

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The other direction in which loss would be suffered is the loss to the pockets of the shareholders because they are deprived of the opportunity of realising their shares to greater advantage. That is a loss suffered exclusively to the pockets of the shareholders, and is in no sense a loss to the coffers of the company, which remain totally unaffected. [emphasis added] 4.3 It is only the first type of injury to which the rule in *Foss v. Harbottle* is directed. The rule does not come into play where a plaintiff seeks to sue for the second type of injury...

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On these authorities it could not be conclusively said that the plaintiffs do not have *locus standi*. Again, for the above reasons the appeal should be allowed on the *locus standi* point.

d

There is another matter that call for our consideration merely for the purpose of completeness. Encik Low contended that apart from the authorities the plaintiffs' action was founded on ss. 181(2) and 132(c) of the Companies Act. Encik Ghazi quite rightly drew our attention to the fact that none of the prayers came under s. 181(2) while s. 131(c) is a penal provision and could not, therefore, be the basis of the action. With respect, we agree with Encik Ghazi's contention on this point. The plaintiff's cause of action is not founded on Section 181(2) and the Companies Act as was the case in *Automobiles Peugeot SA v. Asia Automobile Industries Sdn. Bhd & Ors.* [1988] 3 MLJ 209 which, therefore, does not help to further the plaintiffs' arguments.

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Delay

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Having disposed of the troublesome issue we would now proceed to consider the real issue in this appeal, i.e. whether the interlocutory injunction issued on 2 April 1993 and dissolved on 27 August 1993 should be restored. We would first deal with the question of delay. As with all equitable reliefs delay is a relevant factor in interlocutory proceedings for injunctive relief. An important maxim in regard to delay is that equity aids the vigilant, and not those who sleep on their rights; "*vigilantibus non dormientibus jura subveniunt*". The essence of an application for interlocutory injunction is that it should be made with promptitude. It is said that the Court will not grant an interlocutory injunction if the plaintiff **having sufficient notice of the defendant's intention to commit the act** sought to be restrained is **guilty of unreasonable delay** in applying to the Court. The illustration of this principle is to be found in the case of *Salisbury v. The Metropolitan Railway Company* [1870] 39 LJR Equity Ch 429. The cases of *Hj. Wan Habib Syed Mahmud* and *Chung Khiaw Bank Ltd.* cited above are Malaysian authorities on the same point. It must be pointed out, however, that not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable.

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Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229 set out at page 268 three factors which are relevant in considering whether delay should be allowed as a ground to refuse an interlocutory injunction. These factors are at page 268. Salmon LJ said:

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- a** ...In order for such an application to succeed, the defendant must show:
- (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
 - b** (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
 - (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As
 - c** a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

It must also be emphasised here what is important to consider is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction claimed. Megarry J's observation in the case of *Legg v. I.L.E.A.* [1972] 1 WLR 1245 appearing at pages 1259-60 is apposite:

- d** I have hesitated somewhat on this point. What seems to be important is not so much the length of the delay *per se*, but whether the delay has in some ways made it unjust to grant the injunction claimed. An injunction granted now would be more burdensome to the I.L.E.A. and to the parents and boys affected by it than an injunction granted two months ago. Nevertheless I am not persuaded that the added burden is of sufficient weight to bar the remedy...
- e** Having said all that, we must first determine at what point of time should delay run in the instant case. Encik Manjit Singh submitted that the relevant date should be 19 September 1992 which was the date when "The Star" published the advertisement that MGR intended to seek public-listing in KLSE Second Board. As the application for the *ex parte* injunction was only filed and granted on 2 April 1993 there was a delay of about 7 months (sic) which had never been explained. On the other hand, his Lordship held that there was a delay of
- f** about 6 months from the date of the extraordinary general meeting of the company, i.e. on 23 August 1992 whereat it was resolved to dispose of the MGR shares, which, according to him, on the advice of Encik Manjit Singh was on 25 December 1992 and signified at the same time the settlement of the balance of the purchase price of those shares by Choong Keong Kor to the date of the application for the *ex parte* injunction, and about 4 months from the date of the discharge of the relevant charge. On what uncontroverted testimony
- g** did his Lordship find that the charge was discharged on 25 December 1992 is baffling because neither in his affidavit dated 11 June 1993 nor in that dated 3 June 1994 did Choong Keong Kor ever aver that he paid the balance of the purchase price on that date. The relevant exhibit on this point, on the other hand, shows that the charge was only discharged on 4 May 1993. It would seem from the submission of Counsel for the defendants and the finding of the learned Judge that there are 3 different dates from which delay begins to run.
- h** It certainly cannot be right in the instant case that there should be 3 different dates for the purpose of determining the relevant date on which delay begins.

- Encik Low, on the other hand, contended that there was no delay, echoing the same stand taken by Encik John Khoo in the High Court below. Encik John Khoo submitted that the question of delay did not arise as the plaintiffs only became suspicious of the *bona fides* of the transactions on the sale of the MGR shares when the legal firm of Messrs Hoe & Ahmad Zaki failed to reply to a letter dated 10 March 1993 from the plaintiffs through their solici-
- i**

tors, Messrs Ismail Khoo & Associates, inquiring as to the whereabouts of MGR original share certificates which the former kept as stakeholder under Clause 5 of the agreement. In his affidavit dated 1 April 1993 and repeated in his further affidavit dated 3 June 1993 Encik Lim Tee Keng stated that in March 1993 the plaintiffs directed their solicitors to write to the firm of Messrs Hoe & Ahmad Zaki to enquire whether the share certificate had been delivered to Choong Keong Kor. Not having received any reply from the legal firm, on 17 March 1993 he paid a visit to Encik Hoe Thean Soon, the solicitor for the defendants to enquire from Encik Hoe Thean Soon personally about the share certificates but was told by the latter that they no longer kept the share certificates and promised to send a reply to their letter dated 10 March 1993. However, until the day the plaintiffs filed the writ no such letter was received. Hence, their suspicion was aroused and confirmed by his visit to Encik Hoe Thean Soon on 17 March 1993 that something was very amiss about the whole affair of the transfer of the MGR shares to Choong Keong Kor. As a result of this grave suspicion the writ was subsequently filed on 1 April 1993 and the application for *ex parte* injunction filed on the following day. In addition to the above submission Encik Khoo also submitted that a search at the land office at Kota Star on 31 March 1993 disclosed that the charge had not yet been discharged. It is implicit in Encik Khoo's arguments that the relevant date for the purpose of determining the delay was the discovery of the fraud which could not be earlier than the date of Lim Tee Keng's visit to Encik Hoe on 17 March 1993 but he did not cite any authority to support this proposition.

We agree with Encik Khoo's argument on the relevant date for the determination of delay. In considering the lapse of time delay commences to run from the **discovery of the circumstances giving title to the relief**. See *Carter v. Trevelyan* 11 CL & F 714 and *Salisbury v. Metropolitan Railway Co.* (*supra*). Another authority on this point is the case of *Erlanger v. New Sombrero Phosphate Co.* [1877-78] 3 AC 1218. Lord Blackburn on the question of delay had this to say at page 1279:

And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been **such notice or knowledge** as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after **such notice or knowledge** should tell more against the party *in mora*, than a similar change before he was *in mora* should do.

It sometimes happens one has been defrauded and the real facts are not apparent to him for years afterward then one has a reasonable time for the discovery of the alleged fraud to bring his action; but not where he knows of the alleged fraud and acquiesces in the wrongful conduct of the defendant and deliberately refuses to assert his rights until sometime afterwards when he sustains an injury.

It is observed that the writ was originally filed on 1 April 1993, hardly two weeks after the discovery of the alleged fraud and within that short space of time perhaps, with insufficient facts to assist the solicitors to prepare the pleadings with such amplitude as to show they have a cause of action, the plaintiffs cannot be said to be guilty of unreasonable delay. The fact that a subsequent amended writ was filed on 27 May 1993 is testimony to the haste with which the original writ was prepared and filed to avoid unreasonable delay on the plaintiffs' part. We would say the plaintiffs under those circumstances had acted with due promptness, given the problems they were facing to get all the relevant information from the reluctant defendants, and are not guilty of any unreasonable delay as to defeat their claims for an interlocutory injunction.

a **Serious Issues To Be Tried**

As we have said earlier on the learned Judge briefly dealt with the question of cause of action as this point was canvassed by Encik Ghazi and held that there was a cause of action. The relevant part of the judgment in Bahasa Malaysia is as follows:

b ... Tanpa mengulangi perbincangan mengenainya, saya tidak fikir bahawa plaintiff-plaintif tidak mempunyai kuasa tindakan ...

c There is nothing in the judgment to indicate any discussion or deliberation on the question of serious issue to be tried which must first be established by an applicant in an application for interlocutory injunction. It is implicit in the judgment of Lord Diplock in the *American Cyanamid's* case that if the material available to the Court fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction then the application must fail. Kerr LJ in *Cayne & Anor. v. Global Natural Resources Plc* [1984] 1 All ER 225 applied the same test and went on to say that if the plaintiff failed to show he had raised a serious issue to be tried then clearly there was no case for an injunction. Similar principle was applied by Slade J in the case of *In re Lord Cable, (decd)* (Ch D) [1977] 1 WLR 7 and this is clear from what he said at page 19:

d ... On any claim for an interlocutory injunction the Court must still, as a first step, consider whether the evidence available to the Court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all: ...

e See also the *dictum* of Balcombe LJ in *Patel & Others v. W.H. Smith (Eziot) Ltd. & Another* [1987] 1 WLR 853 at page 861 (D-E):

f ... If there is no arguable case, as I believe there is not, then questions of balance of convenience, *status quo* and damages being an adequate remedy do not arise. *Prima facie* the plaintiff are entitled to an injunction to restrain trespass on their land. Certainly, having regard to the fact that the Judge exercised his discretion on a basis which I have found to be an incorrect one, the discretion becomes that of this Court and if it becomes necessary to choose between the line of authority represented by *Woollerton and Wilson Ltd. v. Richard Costain Ltd.* [1970] 1 WLR 411 and *John Trenberth Ltd. v. National Westminster Bank Ltd.* 39 P & CR 104 and that represented by *Behrens v. Richards* [1905] 2 Ch 614 it seems to me quite impossible to say that there is no potential damage to be suffered here by the plaintiffs if the injunction is not granted and on that basis, if there is a discretion here, I would undoubtedly exercise it in favour of granting the interlocutory injunction to restrain trespass.

g From these authorities it is clear if the plaintiff fails to raise a serious issue to be tried his application will fail *in limine*. (See the illustration of this principle in *C.B.S. Songs Ltd. v. Amstrad Consumer Electronics Plc.* [1988] AC 1013.

h In view of the welter of authorities especially those quoted above it is beyond comprehension why the learned Judge did not consider as a matter of principle and priority the question whether there was in this case a serious issue to be tried but leapfrogged to consider the question of adequacy of damages and balance of convenience instead. Counsel for the respondents on the other hand did nothing at all to impress upon the learned Judge the importance of deciding first the question of serious issues to be tried, rested content with the *locus standi* issue. Lord MacNaghten's quotation in a 1903 judgment "With the light before him why should he shut his eyes and grope in the dark" would aptly describe Counsel's conduct in handling this issue. We do not wish it to be misunderstood that in insisting on the adherence to the *American Cyanamid's* guidelines we were attempting to

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pontificate on those principles. The fact of the matter is those principles have been adopted and applied in our Courts without fail when the case warrants it.

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At an interlocutory proceeding for an injunction the Court is not called upon nor is it desirable for the Court to decide finally on the rights of the parties but the Court must be satisfied that there is a serious issue to be tried. The Court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law now hallowed by the famous words of Lord Diplock in the *American Cyanamid's* case:

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... It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.

c

Since Encik Low raised the serious issues to be tried point and argued on it at considerable length before us and Encik John Khoo before the learned Judge it is incumbent on us to make our finding on this issue. It would be necessary, at the risk of being repetitive, to recapitulate on the plaintiffs' cause of action. Basically, the action is for a declaration that the agreement of 1 September 1992 is void being *ultra vires* the resolution of the extraordinary general meeting of the company held on 23 August 1992 and that even if it is valid, which is denied, there is also a breach of the terms of the agreement, particularly Clause 3 and Clause 5, resulting in the automatic termination of the agreement. It is also founded on the breach of the agreement, assuming that it is valid, and also on tort, because of the fraud on the minority shareholders being perpetrated by Lim Cheng Teek in conspiracy with Choong Keng Kor.

d

We have highlighted the various allegations on these issues earlier on and what we need to consider now is whether the statements contained in the affidavits of the plaintiffs have raised a *prima facie* plausibility to merit further investigation as to their truth. The breach of Clause 3 of the agreement is a highly contentious issue in these proceedings. Encik Low's contention is that the balance of the purchase price should have been settled on the completion date which fell on 28 February 1993 or at the latest 1 March 1993, i.e. 6 months from the date of the agreement, but as far as the plaintiffs are concerned there had been no transfer to Choong Keong Kor because no evidence of the payment of the completion sum and no instrument evidencing the transfer of the shares had been produced. Besides, all the relevant forms under the National Land Code or the Companies Act were not exhibited as proof of the settlement of the purchase price.

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A letter dated 15 April 1993 from MIDF Consultancy and Corporate Services Sdn. Bhd. to the plaintiffs' solicitors was exhibited to the effect, *inter alia*, that they had not received as on that date the instrument of transfer nor any instructions to transfer the shares registered in the name of the company to Choong Keong Kor. The MGR Members Circular No. L/O 1156 of 1992 dated 4 December 1992 and MGR Share Certificates registered in the name of the company dated 1 October 1992, 2 October 1992 and 3 December 1992, were also exhibited as further proof that the shares on those dates still belonged to the company. As had been adverted to earlier on according to the exhibit the relevant charge was only discharged on 4 May 1993.

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Then there was the other allegation that the agreement is *ultra vires* the resolution of the extraordinary general meeting of the company on 23 August 1992 and even if there was payment, which was denied, the completion date was extended by Lim Cheng Teek without the resolution of the extraordinary general meeting of the company. On the question of the

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a discharge of the charge we are mindful that the provisions of s. 278(1) of the National Land Code are relevant. Under this section the discharge of the charge only takes effect as from the date on which the instrument is registered and in this case it was on 4 May 1993. Encik Low also alleged that there was no evidence of the transfer of 97,000 shares which, according to MGR Circular, could be disposed of on 9 December 1993. The question in this respect is by whom and when the shares were disposed of and to whom?

b As has been adverted to earlier on there is another allegation that 292,500 shares were offered to the public and that another lot of 424,500 shares were transferred to UWB Nominees Sdn. Bhd. without the knowledge and consent of the shareholders and that the proceeds of the sale of these lots of shares were not accounted for to the company or to the shareholders. The next question raised in connection with the disposal of these two lots is who disposed of them or if it was disposed of by Choong Keong Kor whether in view of

c the absence of proof of his ownership of the shares the disposal of these shares is valid.

Encik Surinder Singh for Choong Keong Kor contended that there was payment of the completion sum or else the charge could not have been discharged and the payment must have been made much earlier than the registration of the discharge of the charge. The delay to register the discharge was attributed to administrative laxity or administrative problems. On

d being asked to produce the evidence of the payment of the balance of the purchase price within two weeks from the date of the hearing of this appeal, he agreed to do so but despite reminders from the Supreme Court no such evidence up to the time this judgment was written is forthcoming. Such tardiness or indifference on the part of the Counsel is very much deprecated and should not be emulated. The legitimate inference that can be drawn from his failure to produce the evidence promised is that there had been no payment. Instead, Encik

e Choong Keong Kor delivered to us an affidavit dated 3 June 1994 in reply to an earlier affidavit affirmed by Encik Lim Tee Keng on 24 May 1994 where the latter alleged that no payment had been made and the agreement had not been executed. Encik Choong Keong Kor evasively replied to say that:

f In respect to the redemption sum of RM3 million, there was never any averment that I had not paid the sum. The only point in dispute was whether it was paid in time so that the charge on the land was discharged and Hongkong and Shanghai Banking Corporation Ltd. have confirmed the same.

Encik Surinder Singh and Encik Choong Keong Kor obviously relied on the letter written by Hongkong and Shanghai Bank dated 26 February 1993 to Perusahaan Kilang Papan Buildstrength Sdn. Bhd., Kota Kinabalu, for the attention of Mr. Loy Lung Khiong where it was stated in paragraph 3 thereof thus:

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With reference to our letter dated 25 February 1993, we advise we shall be expediting the discharge and release of the following security as requested:

(1) our charge over the property held under Title No. GN 5905, Lot 4, Section 16, Town of Alor Setar, Kedah.

h The reference to the title of the land in the letter is a reference to the land that was charged by the company and to be discharged by Choong Keong Kor to settle the balance of the purchase price referred to as "redemption sum". In our view this letter is not a clear and conclusive proof of the payment by Choong Keong Kor of the "redemption sum". We must also point out that in his affidavit dated 24 May 1994 Encik Lim Tee Keng stated that the

i letter dated 26 February 1993 was not addressed to Choong Keong Kor and that if there was any payment for the discharge of the charge as required under Clause 3 of the agree-

ment it was not effected by Choong Keong Kor. It seems strange for Choong Keong Kor, if payment indeed had been made, to refrain from saying categorically and unequivocally in his affidavit that payment was effected by him on such and such a date and not produce the receipt. Nothing can be much simpler than for him to produce the receipt to reinforce Encik Surinder Singh's argument. Be that as it may, the burden to prove the payment of the completion sum is on the defendants which so far had not been discharged to our satisfaction. The irresistible reference that could legitimately be drawn from the evasive reply and absence of proof of payment of the "redemption sum" by Choong Keong Kor is the negation of the payment by him. a
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The remarks of Sir Robert Megarry V.C. in *Mothercare Ltd. v. Robson Books Ltd.* [1979] F.S.R. 466 at page 474 are worth quoting:

The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real'. c

All the issues raised by the plaintiffs adverted to above are *prima facie* serious issues to be tried and on the materials available there is no reason for us to say that they are not plausible. d

Adequacy Of Damages

Encik Ghazi submitted that since the claim was the loss of profits on the sales of MGR shares to Choong Keong Kor damages would be an adequate remedy which could be quantified and the question of interlocutory injunction did not arise. With respect, we disagree with his submission. A look at the prayers show that several different damages are claimed and are reproduced here for convenience: e

- (v-a) Loss resulting from the increase of the original 628,500 shares to 1,365,000 shares after public listing of MGR; f
- (v-b) Loss from the sale of 292,500 MGR shares to members of the public without the knowledge of the plaintiffs;
- (v-c) Loss as a result of the transfer of 424,500 shares to UWB Nominees Sdn. Bhd.
- (vi) General damages following the fraud. g
- (vii) Loss as a result of misuse of information by the second defendant.
- (viii) Exemplary damages.
- (ix) Aggravated damages.

The majority of these damages clearly do not admit of easy quantification and it would not be right for us to venture into the realm of speculation as to what the exact quantum would be at this stage of the proceedings. Besides, the value of the shares fluctuate from time to time. In this regard we find support in the observation of Sach LJ at page 380 in the case of *Evans Marshall & Co. Ltd. v. Bertola S.A. & Anor. (CA)* [1973] 1 WLR 380 thus: h

The Courts have repeatedly recognised that there can be claims under contracts in which, as here it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in i

a estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in common law action for breach of contract: loss of goodwill and trade reputation are examples - see also, in another sphere, the judgment of Jenkins LJ in *Vine v. National Dock Labour Board* [1956] 1 QB 658, 676 which, albeit a dissenting judgment, was unanimously adopted *in toto* in the House of Lords. Generally, indeed, the grant of injunctions in contract cases stems from such factors.

b In view of the doubt as to the adequacy of the remedies it is incumbent upon us now to deal with the question of balance of convenience.

Balance Of Convenience

c Encik Low for the plaintiffs submitted that the balance of convenience was in their favour since consistent with his earlier arguments on the serious issues to be tried and delay points, the Hongkong and Shanghai Bank was still the chargee, meaning of course that there was not yet at the material time payment of the completion sum in order for the charge to be discharged in accordance with Clause 3 of the agreement. Therefore, there could not be a valid transfer to Choong Keong Kor of the MGR shares. Encik Surindar Singh disagreed with this argument and submitted that the charge had been discharged following inevitably the payment of the completion sum which allegedly had been paid. Similarly, since the relevant MGR shares had been registered following the transfer to Choong Keong Kor the position of the parties had changed and under the circumstances an injunction would be an exercise in futility. The parties could not revert to *status quo ante*. What the plaintiff in effect asked the Court was the rescission of the agreement. Quoting **Chitty on Contract**, 25 Edition and **Specific Relief**, 9th Edition, Vol. I by Anand and Iyer he said the agreement could not be rescinded by the party misled or defrauded after the position of the parties had been changed so that the former state of things could not be restored. Furthermore, a contract voidable for fraud could not be avoided when the other party could not be restored to its *status quo* and the only remedy in such a case was damages, quoting the case of *Sheffield Nickel and Silver Plating Co. Ltd. v. Unwin* [1877] 2 OB 214. On this issue Lim Cheng Teek averred in his affidavit that since the transaction was already completed the company was merely a trustee for Choong Keong Kor until the necessary instruments had been registered.

f We agree with Encik Surinder Singh's submission only if it had been proved by uncontroverted evidence that the transfer of the shares had in fact been completed and registered, but as we have said earlier on there is until now no such evidence before us. Such argument cannot be sustained, if, as is the case here, it is based upon a hypothesis that the sale had been completed within the time stipulated in the agreement and all that the purchaser was obliged to perform had in fact been performed. The validity and force of this argument is elided on account of the hypothesis.

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Be that as it may, the grant of refusal of an interlocutory injunction must be decided on the fundamental principle that the Court should take whichever course that appears to carry the lower risk of injustice. We are engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at the stage when the evidence is incomplete. On the one hand there is the risk that if the interlocutory injunction is refused but the plaintiffs succeed in establishing at the trial their legal rights for the protection of which the injunction has been sought they may in the meantime have suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense. On the other hand, there is the risk that if interlocutory injunction is granted but the plaintiffs fail at the trial the defendants may in the meantime have suffered harm and inconvenience which is similarly irrecompensable.

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It is necessary for us to examine the facts again and we may repeat in the process what we have discussed earlier in regard to other issues.

The factor that weighed heavily on the mind of the learned Judge in deciding on the balance of convenience in favour of the defendants was the completion of the agreement and the subsequent transfer of the MGR shares to Choong Keong Kor. Several exhibits produced by Li Tee Keng are enlightening.

Originally, MGR Share Certificate bearing no. 00014 dated 2 October 1992 shows that the company's shares to be 682,500 shares. By an MGR resolution dated 10 October 1992 allocation of new shares were approved by way of rights issue and then the company's 682,500 shares became 1,365,000, all still held by the company. According to the MGR work-sheet the company's shares in MGR are divided into three types:

- (a) 292,500 shares were offered for sale;
- (b) 648,000 shares were placed under moratorium;
- (c) 424,500 shares free from moratorium

MGR Members' Circular no. L/O 1156 of 1992 dated 4 December 1992 advised its shareholders, including the company, that a moratorium was imposed on the sales of their shares in MGR. Another exhibit shows that MGR offered 2,925,000 of its shares to the public, including the 292,500 of the company's shares, at RM2.30 each. However, no date when the offer was made was mentioned in the circular. It must be presumed in the absence of any evidence to the contrary that Lim Cheng Teek as managing director of the company must have taken the initiative to offer those shares for sale to the public and certainly the offer could not have come from MGR. Another important exhibit in so far as the question of the transfer of shares to Choong Keong Kor is concerned is the transfer of shares form. This form shows that 424,500 of the company's shares in MGR were transferred to UWB Nominees Sdn. Bhd. What is interesting about this Form is that it was signed by Lim Cheng Teek as managing director of the company on behalf of the company and an endorsement appearing above the signature of Lim Cheng Teek which reads "There is No Change in the Beneficial Ownership". Another significant feature of the Form is that in paragraph 6 it is stated that the consideration for the transfer is "Nominal. If the endorsement means what it says then the beneficial owner of the shares is still the company despite the apparent transfer. In his affidavit Lim Tee Keng claimed that this transfer was executed on 18 November 1992. The piquant question that arises is why should the transfer be subjected to the qualification and for a consideration expressed as "Nominal" which question is worthy of investigation at the trial. Is it intended to mean there is no actual transfer, the ownership of the shares being still vested in the company? We would respectfully say that it leaves us with the inexorable conclusion that it is a negation of the purported transfer of the 424,500 shares. As to the disposal of the 97,000 shares subject to the moratorium which could be disposed of on 9 December 1993 we were told by Encik Surindar Singh that they were disposed of after the *ex parte* injunction was dissolved but no specific date of the disposal or any concrete evidence to support his claim was produced.

Lending credence to all the exhibits is the letter from MIDF Consultancy Ltd. of 15 April 1993, the vital portion of which we had already adverted to earlier on. It passes beyond the bounds of credibility that if there is a genuine transfer of shares to Choong Keong Kor why should he be evasive about the payment of the completion sum and the shares be still registered in the name of the company and not the purchaser, considering that the burden to prove the payment and the transfer was on him. All these exhibits tend to point to the

a inescapable conclusion that the allegation of fraud is not without any basis and that there is more than meets the eye. It may well be that some perfidious scheme is afoot to carry out the fraud as alleged by the plaintiffs which the proper trial could uncover.

b Having regard to our observations above it can be seen that at one end of the spectrum of possibilities if the plaintiffs fail at the trial all that the defendants would suffer because of the injunction is the loss of profits and costs of the litigation which can be quantified and the defendants could adequately be compensated and at the other end if the injunction is refused and the plaintiffs should succeed they would suffer unquantified monetary loss, harm and inconvenience which could not be adequately recompensed. In that case more injustice would be done to the plaintiffs. In addition, since on the evidence before us there is no vestige of the transfer of the shares to Choong Keong Kor or to any other persons the *status quo* may be preserved which should be the state of affairs existing during the period

c immediately preceding the issue of the writ claiming permanent injunction or, if there be unreasonable delay between the issue of the writ and the application for an interlocutory injunction, the period immediately preceding the application. (See Lord Diplock's judgment at page 140, paragraphs C-D in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [H.L.(E)] (1984) 1 A.C. 130. The balance of convenience clearly, therefore, lies with the plaintiffs.

d For the reasons we have given above on all the issues raised in this appeal, we are all of the view that this appeal should be allowed with costs here and below and the interlocutory injunctive orders be restored until further order. The deposit is to be refunded to the plaintiffs.

e Finally, for the purpose of completeness we would briefly touch on the scope of the interlocutory injunctive orders. As can be seen from paragraph 20 of the statement of claim the first two prayers concern injunctive orders. Prayer (i) is for an order to restrain the first defendant and the second defendant, their servants, agents, employees or any other persons from disposing of the shares or registering the "executed" memorandum of transfer referred to in the agreement dated 1 September 1992 between the company and Choong Keong or, and prayer (ii) is for an order that the registration of the "executed" memorandum of transfer between the company and Choong Keong Kor and the transfer of the shares in

f the name of Choong Keong Kor or his nominees or any other persons be restrained. The transfer of the MGR shares that is referred to in these two prayers is the transfer of the original 682,500 shares in MGR but which subsequently proliferated to 1,365,000 shares after the allocation of rights issue and bonuses accruing from the 682,500 shares. It is *fait accompli* and, therefore, there is no sense in talking about 682,500 shares to be subjected to the injunction. However, as we have arrived at the conclusion that there is no evidence that the

g 1,365,000 shares have changed hands, neither to Choong Keong Kor nor to UWB Sdn. Bhd. or any other persons, therefore, all these shares should be the subject matter of the injunctive orders claimed. However, we note that in Prayer No. (v-c) compensation was claimed on the transfer of the 424,500 shares and in Prayer No. (v-d) an account of the sale of 292,500 shares offered to the public. To would appear there is a contradiction between the two prayers and the argument canvassed in the High Court below and before us. Consistent with

h our view on the ownership of the shares which upon the evidence available in the record of appeal would still appear to be appear vested in the company, therefore, the interlocutory injunctive orders should cover the whole of the 1,365,00 shares as well as those shares referred to in the agreement.

i Finally, in the interest of justice there will also be an order for an early trial.